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United States

Nos. 75-62, 75-66, 75-278 and 75-306

RUSSELL L. RUNYON, et al.,
Petitioners,

vs.

MICHAEL C. McCRARY, etc., et al.,
Respondents.

BRIEF OF DADE CHRISTIAN SCHOOLS, INC., AS AMICUS CURIAE

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BRIEF OF DADE CHRISTIAN SCHOOLS, INC., AS AMICUS CURIAE

I. INTRODUCTION

Pursuant to this Court's order of January 12, 1976, Dade Christian Schools, Inc., (Dade Christian) respectfully submits this its brief as *amicus curiae* in support of the Petitioners' position.

II. THE INTEREST OF DADE CHRISTIAN

A. *The History of Dade Christian*

The New Testament Baptist Church (New Testament) was founded approximately twenty years ago in Miami, Florida, under the leadership of the Rev. Dr. A. C. Janney. It was conceived as a wholly independent religious group with a theological outlook similar to that espoused by the Rev. Bob Jones. See, *Bob Jones University v. Simon*, 416 U.S. 725 (1974). Dr. Janney still serves New Testament as its spiritual leader and the group's membership is approximately four thousand people.

Dade Christian was chartered by the State of Florida in 1962 as a non-profit corporation to be engaged in the operation of a private school "guided in its operations, objectives, management, program and pursuits by Christian spiritual values." The founders of Dade Christian were members of New Testament who, in response to this Court's decisions barring state-prescribed prayer and Bible reading in the public schools, were anxious to provide their children with Christian educations. Since its inception, Dade Christian has been an operating affiliate of New Testament, Dade Christian's physical facilities have been

on the premises of New Testament, Dade Christian's operating policies have been formulated by New Testament, and Dade Christian's president has been Dr. Janney.

After consulting the Scriptures, the membership of New Testament, by means of a vote taken on July 17, 1963, decided that the Church should not be racially integrated; it was the consensus of the Church membership that racial integration would constitute a tacit endorsement of racial intermarriage, a practice clearly contrary to the Divine scheme of things. Subsequent to that vote, the public controversy generated by the desegregation of the Dade County, Florida, public schools caused the leadership of Dade Christian and New Testament to face the necessity of devising a policy with respect to the racial composition of the school's student body. Guided by the Church's prior decision not to integrate its membership, Dade Christian decided that its student body should also not be integrated.

On July 26, 1973, Mrs. Marice Brown and her two daughters, Valerie Michelle Brown and Jacqueline Marie Brown, members of the black race, appeared at the premises of Dade Christian, 6601 N. W. 167th Street, Miami, Florida 33015, for the purpose of enrolling the two girls in the day school program operated by Dade Christian. Mrs. Brown and her two daughters reported to the admissions office. The receptionist furnished Mrs. Brown with several pieces of informational literature and two application forms. Mrs. Brown began to complete the forms, but before she was able to write down all the information requested, a school official appeared and beckoned Mrs. Brown and her two daughters into another room. Mrs.

Brown and the two girls went into an adjacent room and the school official closed the door behind them. The official then handed a pre-printed statement to Mrs. Brown, the text of which read as follows:

DADE CHRISTIAN SCHOOLS
6601 N. W. 167th Street
Hialeah, Florida 33015

We are very sorry . . .
But the policy of the school is one of non-integration and we would request that you respect this policy.

School Administration

The school official then directed Mrs. Brown and her two daughters to the building's exit. They left the building, at which time Mrs. Brown used a public telephone to call her home. In response to Mrs. Brown's call, her husband, Johnny Brown, Jr., drove to the school and took his wife and daughters home.

B. *The Brown-Riley Lawsuits*

(1) *Brown v. Dade Christian Schools, Inc.*

On August 6, 1973, the Brown family brought suit in the United States District Court for the Southern District of Florida, Miami Division, against Dade Christian, Dr. Janney, V. S. Ackerman, John M. Kalapp, and Arthur E. Kreft seeking damages and injunctive relief. That action was assigned to United States District Judge Joe Eaton and

was given Civil Action No. 73-1313. The complaint alleged that the defendants had violated the plaintiffs' federally-protected civil rights by excluding, solely upon the basis of race, Valerie Michelle Brown and Jacqueline Marie Brown, from Dade Christian's student body. Although the complaint alleged violations of several civil rights statutes, the plaintiffs eventually premised their claim for relief solely upon 42 U.S.C. §1981.

Dade Christian and the individual defendants (past and then-present officers of the school) answered the complaint by admitting that the Brown children had been denied admission to Dade Christian solely because of their membership in the black race. In addition to denying that §1981 was applicable to Dade Christian, the defendants affirmatively asserted:

"13. Defendant Dade Christian Schools, Inc., is an operating affiliate of the New Testament Baptist Church, Miami, Florida.

"14. The non-corporate defendants are members of the New Testament Baptist Church, Miami, Florida.

"15. The educational facility to which the minor plaintiffs sought admission on July 26, 1973, is located on the premises of the New Testament Baptist Church, Miami, Florida.

"16. Since its founding, the operating policies of Defendant Dade Christian Schools, Inc., have been formulated and prescribed by the New Testament Baptist Church, Miami, Florida.

"17. On several occasions subsequent to the founding of Defendant Dade Christian Schools, Inc., the New Testament Baptist Church resolved not to accept black students in the facilities of Defendant Dade Christian Schools, Inc.

"18. The resolutions referred to in paragraph 17 of this amended answer were based upon biblical directives, as interpreted by the church leadership and membership, forbidding the commingling of the white and black races under circumstances which may tend to promote interracial marriage.

"19. In light of the religious basis for the resolutions referred to in paragraphs 17 and 18 of this amended answer, the application to defendants of the federal statutes mentioned in paragraph 1 of the complaint so as to penalize defendants for their policy of excluding black students from Defendant Dade Christian Schools, Inc., would constitute a violation of the rights, privileges and immunities of defendants and those for whom they have acted under the Free Exercise of Religion Clause of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution."

On May 28, 1975, Judge Eaton rendered oral findings of fact and conclusions of law with respect to the liability

phase of the case. The District Court's findings and conclusions were transcribed by the court reporter and are reprinted at pages 1 through 20 of the Appendix to this brief. In essence, Judge Eaton held (1) that under the majority opinion in *McCrary v. Runyon*, 4 Cir., 1975, 515 F.2d 1082, §1981 applied to Dade Christian's racially discriminatory admissions policy; and (2) Dade Christian's policy of excluding blacks from its student body was not "religiously" based within the contemplation of the Free Exercise Clause of the First Amendment to the Constitution. Final judgment in favor of the Brown family and against Dade Christian alone was entered on June 27, 1975, the text of which appears at pages 21 through 23 of the Appendix to this brief. Dade Christian filed its notice of appeal to the United States Court of Appeals for the Fifth Circuit on July 1, 1975. The Court of Appeals later assigned Case No. 75-3260 to Dade Christian's appeal.

(2) *Riley v. Adirondack Southern School for Girls*

Arlizabeth Riley, individually and as mother and next friend of an infant-plaintiff, Marcellette Riley, brought suit in the United States District Court for the Middle District of Florida, Tampa Division, against a private girls' school, Adirondack Southern School for Girls, and its headmaster, Dr. George H. Longstaff. The plaintiffs alleged that the defendants had refused to admit the minor plaintiff into the school's first grade because of the school's policy of excluding black applicants, that policy being in violation of §1981. The defendants denied that the school maintained a racially discriminatory admissions policy and contended that the young lady had been refused admission because of immaturity.

A non-jury trial was held by United States District Judge Wm. Terrell Hodges on October 29, 1973. On December 19, 1973, Judge Hodges rendered judgment for the defendants. *Riley v. Adirondack Southern School for Girls,* M.D. Fla., 1973, 368 F. Supp. 392. The District Court in *Riley* reasoned that although evidence had been presented at trial tending to establish that race had been a factor in the school's decision to reject Miss Riley, the plaintiffs had not sustained their burden of proving that the young lady, but for the defendants' racially-premised admissions policy, would have been qualified for entry into the school's student body. A timely appeal was taken by the plaintiffs to the United States Court of Appeals for the Fifth Circuit, which assigned it Case No. 74-1976.

The United States of America, appearing through the Civil Rights Division of the Department of Justice, on December 24, 1974, filed its brief as *amicus curiae* in *Riley* with the Fifth Circuit. That brief supported the position taken by the Riley's and argued that the District Court had incorrectly construed §1981 to apply only to situations in which race is the sole factor considered by a defendant.

Following the submission of the United States' brief as *amicus curiae* in *Riley,* Dade Christian filed its brief as *amicus curiae* with the Court of Appeals in support of the defendants. The Dade Christian brief urged that the District Court's judgment be affirmed, but not on the basis of Judge Hodges' opinion. Instead, Dade Christian asked the Fifth Circuit to affirm the District Court on the theory that §1981 does not apply to private schools which do not receive state assistance.

A panel of the Fifth Circuit heard oral argument in *Riley* on March 10, 1975, at Jacksonville, Florida. Although the United States did not participate in that proceeding, counsel for Dade Christian, arguing that §1981 should not be held applicable to self-supporting private schools, did. Before the panel produced a decision, the Court of Appeals, on June 30, 1975, ordered that the submission to the panel be vacated and the case heard *en banc.* The parties and *amici curiae* were advised that supplemental briefs could be filed for the consideration of the *en banc* Court.

The United States of America, again appearing through the Civil Rights Division of the Department of Justice, on July 21, 1975, submitted to the Court of Appeals a supplemental brief as *amicus curiae* which argued that §1981's prohibition against racial discrimination was applicable to the admissions policies of Adirondack Southern School for Girls and that §1981, as so applied, was a constitutional exercise of Congress' power to enforce the Thirteenth Amendment to the Constitution. Oral argument to the *en banc* Fifth Circuit was presented on September 16, 1975, at New Orleans, Louisiana, in which proceeding the United States participated in support of the Riley's and Dade Christian in support of the defendants.

The Court of Appeals did not hand down a decision in *Riley.* Instead, on October 6, 1975, it directed that Dade Christian's appeal be heard *en banc* together with the reargument *en banc* of *Riley.* 522 F.2d 622. Initially, the Court of Appeals indicated that it would hear oral argument in the consolidated appeals during the week of January 19, 1976. However, on December 23, 1975, the Clerk

of the Fifth Circuit wrote to all counsel of record that "the Court has instructed this office to notify counsel that the above cases are being held pending the decision of the Supreme Court in *McCrary v. Runyon*, 4th Circuit, 1975, 515 F.2d 1082."

C. *The Internal Revenue Service Rulings*

In *Green v. Kennedy*, D.D.C., 1970, 309 F.Supp. 1127, appeal dismissed *sub nom. Coit v. Green*, 400 U.S. 986 (1971), the United States District Court for the District of Columbia preliminarily enjoined the Secretary of the Treasury and the Commissioner of Internal Revenue from according tax exempt status to private schools in Mississippi which excluded black students on the basis of race or color. Thereafter, the Internal Revenue Service, in July, 1970, announced that "it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax deductions." See, Revenue Ruling 71-447, 1971-2 C.B. 230. The District Court, in *Green v. Connally*, D.D.C., 1971, 330 F.Supp. 1150, affirmed *sub nom. Coit v. Green*, 404 U.S. 997 (1971), placed its stamp of approval upon the Internal Revenue Service's new policy. Revenue Ruling 71-447 was the basis for Dade Christian's subsequent loss of its tax exempt status.

The District Court's opinion in *Green v. Connally*, supra, contained the following prophetic passage:

> "The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose. Section 503 of the Model Anti-Discrimination Act, *supra* note 37, permits religious educational institutions 'to limit admission or give preference to applicants of the same religion.' We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. Such a problem may never arise; and if it ever does arise, it will have to be considered in the light of the particular facts and issue presented, and in light of the established rule, *see* Mormon Church v. United States, 136 U.S. 1 (1890), that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them." 330 F.Supp. at 1169.

On May 22, 1975, the Internal Revenue Service issued Revenue Ruling 75-231, the purpose of which was to deny tax exempt status to organizations, including churches, that conduct schools with a policy of refusing to accept children from certain racial or ethnic groups. The Ruling posited the following factual situations:

> "*Situation 1*.
>
> "*X* was organized as a separate corporate entity under the auspices of an organization qualifying as a church for the express purpose of operating a school for the children of the local community

in which the church regularly conducts secretarian religious services. The governing body of the church is a council whose members are selected from the church's congregation. The council selected the original members of *X's* board of directors and maintains full control over all aspects of its operating program.

"*X* maintains and operates a school program that corresponds with the public school program for the same grades. Although its program includes a 10-minute religious service at the start of each school day and the devotion of other amounts of time to religious themes and subjects, the school complies with State law requirements for public education. The school has a policy of refusing to accept any children from certain racial and ethnic groups.

"*Situation 2.*

"An organization qualifying as a church, having a full complement of active religious functions, directly supervises and controls, as part of its overall operations, *Y* school. *Y* is not separately incorporated. *Y's* operations do not differ in any material respect from those carried on by *X* in *Situation 1*, including, as a matter of school policy, the exclusion of students from certain racial and ethnic groups.

"*Situation 3.*

"*Z*, an organization qualifying as a church, operates a school identical to *Y* in Situation 2. *Z* also organized and controlled as a separate corporate entity a school identical to *X* in *Situation 1*. *Z* asserts that the policy observed by the two schools of excluding children from certain racial and ethnic groups is required by the tenets of the religion it embraces."

Whether by design or by accident, Situation 3, supra, substantially describes the facts and circumstances governing the relationship between New Testament and Dade Christian. Discerning from the body of this Court's decisions and the enactments of the Congress a "well-established Federal public policy against racial discrimination in education, whether public or private", the Internal Revenue Service concluded that the religious organizations described in the three situations, supra, were not eligible for tax-exempt status under §501(c)(3) and §170 of the Internal Revenue Code. Revenue Ruling 75-231 specifically denied tax-exempt status to those religious entities engaging in racially or ethnically discriminatory school admissions policies on the basis of religious beliefs:

> "*Situation 3* differs from *Situations 1* and *2* in that *Z* asserts that a tenet of the religion which it embraces requires that the schools maintain a racially discriminatory policy as to students. It is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly

contrary to Federal public policy. Thus, for example, the Supreme Court in *Mormon Church v. United States,* 136 U.S. 1 (1890), upheld the constitutional validity of a series of Federal statutes that, among other things, had abrogated the corporate charter previously granted to the members of a specific church by a special act of the territorial legislature of Utah and had directed the institution of judicial proceedings for a complete winding up of its affairs, all because of its persistent promotion and defense of polygamy in direct violation of Federal statutory law.

"That those responsible for a given course of conduct may sincerely believe that they have a religious duty to act in a certain manner does not alter the situation. The First Amendment, which provides in part that Congress shall make no law prohibiting the free exercise of religion, does bar governmental interference with mere religious beliefs and opinions, but it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious. *See Reynolds v. United States,* 98 U.S. 145, 166-167 (1878); *Mitchell v. Pilgrim Holiness Church Corporation,* 210 F.2d 879 (7th Cir. 1954), *cert. denied,* 347 U.S. 1013 (1954); *U.S. v. Craft,* 423 F.2d 829, 833 (9th Cir. 1970); and *Linscott v. Millers Falls Co.,* 440 F.2d 14 (1st Cir. 1971).

"The important distinction between religious belief, on the one hand, and the legal consequences that may validly be attached to action induced by

religious belief, on the other, is well illustrated by one recent line of cases interpreting the Federal drug laws. The courts have repeatedly refused to engraft a religious exception on any criminal statute outlawing the transportation of heroin, marijuana and peyote into the United States, notwithstanding an apparent judicial recognition that a given accused might sincerely believe the use of such drugs has a proper place in certain religious ceremonies which are prescribed in both the Koran and the Bible. *See U.S. v. Spears,* 443 F.2d 895 (5th Cir. 1971), and other cases therein cited.

"Accordingly, in *Situation 3* neither the separately incorporated school nor *Z* itself is operated exclusively for charitable purposes and neither qualifies as a charity for Federal income tax deduction and exemption purposes under sections 170 and 501(c)(3) of the Code."

As this Court noted in *Bob Jones University v. Simon,* supra, 416 U.S. at 749-750, it is not presently possible for a taxpayer to obtain advance judicial review of a revocation by the Internal Revenue Service of the exempt status of an otherwise eligible charitable entity which practices racial discrimination. Consequently, while Dade Christian came under the coercive impact of the District Court's June 27, 1975, injunctive order, New Testament was compelled to comply with Revenue Ruling 75-231 rather than face the disastrous prospect of the loss of its tax exempt status.

III. SUMMARY OF ARGUMENT

A. To properly accommodate the conflicting constitutional claims asserted in these cases, §1981 should be interpreted as inapplicable to the relationships among private schools, parents and students.

B. Should this Court conclude that §1981 does apply to the racially discriminatory admissions policies of private schools, the door should not be closed to the interposition of a defense predicated upon the Free Exercise Clause of the First Amendment to the Constitution.

IV. ARGUMENT

A. To properly accommodate the conflicting constitutional claims asserted in these cases, §1981 should be interpreted as inapplicable to the relationships among private schools, parents and students.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This Court has repeatedly recognized as protected by the First Amendment a freedom to associate without governmental interference. For example, in *National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court held that the State of Alabama's order demanding the production of the Association's membership lists violated the Association's freedom of association as guaranteed by the Due Process Clause of the Fourteenth Amendment. Similarly, in *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963), this Court held that the Association's program of providing free legal services to individuals aggrieved by racially discriminatory practices was protected from State restrictions by the First and Fourteenth Amendments.

The Thirteenth Amendment to the United States Constitution provides:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1981, Title 42, United States Code, provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue,

be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982, Title 42, United States Code, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court has held that §1982 applies to private racially discriminatory action and, as so applied, represents a proper exercise of legislative power under Section 2 of the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). Additionally, this Court has indicated that §1981, like §1982 derived from the Civil Rights Act of 1866, 14 Stat. 27, is also constitutionally applicable to private racially discriminatory conduct. *Johnson v. Railway Express Agency*, _____ U.S. _____, 44 L.Ed. 2d 295 (1975).

Clearly, the instant cases present a direct clash of constitutional claims: the schools involved assert that the freedom of association guaranteed by the First Amendment authorizes them to use racially discriminatory admissions criteria with impunity, while the plaintiffs

contend that §1981 supersedes any associational considerations. See, Note, Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination, 84 Yale Law Journal 1441 (1975). Dade Christian believes that this confrontation may be appropriately resolved through an analysis of several of this Court's decisions.

In *Meyers v. Nebraska*, 262 U.S. 390 (1923), this Court reversed a state court conviction obtained following a violation of a statute making it a misdemeanor to teach a foreign language to a child who had not passed the eighth grade of school. This Court declared that the Nebraska statute infringed upon the accused's liberty as a teacher under the Fourteenth Amendment and that there existed no emergency condition to constitutionally justify the State's action.

Citing the *Meyers* decision, this Court, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), invalidated an Oregon statute establishing criminal penalties for parents of children between the ages of eight and sixteen years who were not enrolled in public schools. It was held in *Pierce* that the challenged statute unreasonably interfered with the "liberty" of parents and guardians to direct the upbringing and education of children under their control.

The *Pierce* decision was cited by this Court in *Norwood v. Harrison*, 413 U.S. 455 (1973), wherein this Court declared unconstitutional a Mississippi program under which the State purchased textbooks and then lent them to students in both public and private schools, even though

a number of the private schools so benefited had racially discriminatory admissions policies. This Court reasoned that the one-race private schools could not legitimately expect to receive tangible assistance from the State. However, as the following excerpt from the *Norwood* opinion indicates, this Court was careful to preserve the right of private schools to operate on a racially discriminatory basis as long as State help was not accepted:

> "Like a sectarian school, a private school — even one that discriminates — fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices — if such in fact exist. Under Brown v. Board of Education, supra, discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. *Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws,* but neither can it call on the Constitution for material aid from the State. (emphasis supplied) 413 U.S. at 469.

The *Norwood* decision is also significant because it distinguished between private racially discriminatory conduct occurring in educational contexts and in non-educational contexts:

> "In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. *And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts* (citing, in footnote 10, *Griffin v. Breckinridge,* 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.,* supra; 42 U.S.C. §2000a; 42 U.S.C. §2000e; and 42 U.S.C. §3601)." (emphasis supplied) 413 U.S. at 469-470.

This Court touched again upon the racially discriminatory admissions policies of some private schools in *Gilmore v. City of Montgomery,* 417 U.S. 556 (1974). In that case, this Court affirmed the Fifth Circuit's prohibition against the exclusive possession of public recreational facilities for official athletic contests and similar functions sponsored by racially segregated private schools. Additionally, this Court remanded the matter for further proceedings concerning the nonexclusive use of city facilities by

racially segregated private schools or nonschool groups. The *Gilmore* decision is noteworthy here because it at no point even hinted that racially segregated private schools could not, consistent with federal law, exist. On the contrary, the *Gilmore* decision closed with the following warning:

> "We close with this word of caution. It should be obvious that the exclusion of any person or group — all-Negro, all-Oriental, or all-white — from public facilities infringes upon the freedom of the individual to associate as he chooses, Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in Moose Lodge. He observed, 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. The individual can be as selective as he desires.' 407 U.S. at 179-180." 417 U.S. at 575.

Although not explicitly articulated in the foregoing decisions, the outcomes in those cases can be harmonized upon the basis that the relationships which exist among private schools, their students and their students' parents are primarily *associational*, as opposed to contractual, in nature. Consequently, as this Court's decisions reflect, it would not be appropriate to apply §1981 to the racially discriminatory admissions policies of private schools which receive no material aid from governmental entities.

This Court's well-established protective approach to

self-sustaining private schools is premised upon the realization that parents who elect to forego the "free" educations provided by the public schools in order to insure special educational experiences for their children are not merely purchasing educational services. More accurately, such parents, often at great financial sacrifice, are attempting to control the associational environments in which their children grow to maturity.

The interpretive approach which Dade Christian is recommending to this Court is not a novel one in the §1981 context. The Fifth Circuit, in *Cook v. The Advertiser Company, Inc.*, 5 Cir., 1972, 458 F.2d 1119, affirmed the District Court's dismissal of a §1981 action against a newspaper based upon the newspaper's refusal to publish the wedding announcement of a black couple on the society page. The Court of Appeals, obviously concerned with the free press implications of the plaintiff's claim, found that no "contract" could ever come into existence for the publication of a wedding announcement, thereby rendering §1981 inapplicable.

Should this Court concur with Dade Christian that the relationships involved herein are not primarily contractual but associational, then it would follow (along the line of reasoning employed in *Cook*, supra) that, in order to preserve the associational rights embodied in the First Amendment, §1981 should not be interpreted to apply to the racially discriminatory admissions policies of private schools. The acceptance of this approach by this Court would result in the reversal of the judgments rendered by the Fourth Circuit in these cases.

B. Should this Court conclude that §1981 does apply to the racially discriminatory admissions policies of private schools, the door should not be closed to the interposition of a defense predicated upon the Free Exercise Clause of the First Amendment to the Constitution.

The opinion of the District Court in *Green v. Connally*, supra, and Revenue Ruling 75-231 proceeded upon the notion that the development of the Free Exercise jurisprudence, as it pertains to the activities of unorthodox religious sects, came to a halt with this Court's decisions dealing with the practice of polygamy by the Mormon community in the Utah Territory. Nothing could be further from the truth.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court, relying in great measure upon the Free Exercise Clause, reversed the state court convictions of members of the Jehovah's Witnesses sect for violating a statute prohibiting the solicitation of contributions to any religious, charitable, or philanthropic cause without the prior approval of the secretary of the public welfare council. A similar result with respect to the solicitations of Jehovah's Witnesses emerged in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

This Court, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), barred the enforcement of a state statute and a regulation of the State Board of Education requiring public school pupils to take part in a salute to the United States flag against members of the Jehovah's Witnesses. Noting that the flag salute ritual

was incompatible with the religious beliefs of that group, this Court held that the Free Exercise Clause prohibited the state officials from compelling participation in the salute by Jehovah's Witnesses.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court ruled that the State of South Carolina could not, consistently with the Free Exercise Clause, deny unemployment compensation benefits to a Seventh Day Adventist because she was not available for work on Saturdays. The *Sherbert* decision is especially significant with respect to the instant cases because it applied the "compelling state interest" test to governmental efforts to regulate or restrict religiously-motivated activity. 374 U.S. at 403. That decision is also noteworthy by virtue of the following passage:

> "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions . . . *'The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order . . .'*" (emphasis supplied, citations omitted) 374 U.S. at 402-403.

This Court, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), found that the State's interest in insuring that its young people are adequately educated did not outweigh the religiously-motivated refusal by members of the Old Amish sect to send their children to school beyond the

eighth grade or the age of sixteen years. Accordingly, this Court affirmed the Wisconsin Supreme Court's reversal of convictions obtained against members of that group under the State's compulsory school attendance statute. The *Yoder* decision of this Court not only explicitly reconfirmed the *Pierce* doctrine of parental control over the educational progress of their children, it underlined the extent to which this Court has exalted the status accorded the Free Exercise Clause in our constitutional universe:

> *"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."* (emphasis supplied) 406 U.S. at 215.

In light of the foregoing pronouncements, it is difficult for Dade Christian to understand how the Internal Revenue Service, in Revenue Ruling 75-231, could display so little respect for the religiously-inspired admissions policies of the affected organizations. In Dade Christian's view, the racially discriminatory admissions policies of church-affiliated private schools could not possibly pose a "substantial threat to public safety, peace or order." *Sherbert v. Verner*, supra. Because universal public education prevails throughout the United States, Dade Christian believes that there exist no "overbalancing" interests which can neutralize a properly raised Free Exercise Clause claim by a church-affiliated private school which selects its students on the basis of race. *Wisconsin v. Yoder*, supra.

The schools named as defendants in the instant cases are not church-affiliated. Consequently, no Free Exercise Clause claims are presently involved. However, Dade Christian respectfully asks that if this Court should determine that private schools are subject to §1981, a caveat be incorporated into the decision of this Court leaving open the possibility that a legitimate claim under the Free Exercise Clause would defeat a §1981 claim. Of course, any claim asserted under the Free Exercise Clause would be subject to judicial scrutiny under the "sincerity" test of *United States v. Seeger*, 380 U.S. 163 (1965).

V. CONCLUSION

The judgments of the United States Court of Appeals for the Fourth Circuit in *McCrary v. Runyon*, 515 F.2d 1082 (1975), should be reversed and the causes should be remanded to the Court of Appeals with directions that the District Court be ordered to dismiss the complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

App. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed May 28, 1975)

FINDINGS OF FACT and CONCLUSIONS OF LAW

What this Court is about to say constitutes findings of fact and conclusions of law on some of the issues in the case, but not all, as you agreed.

When this case was filed there were pending in the United States Court of Appeals for the Fourth Circuit, the case of McCrary v. Runyon and the Southern Independent School Association, two cases, consolidated. Everybody involved in this case before this Court recognized that that case would control the initial question before this Court. I think it fair to say, and the Court announces this as being true, that the facts in the Fourth Circuit Court of Appeals case comport with the facts in this case and we, in the exercise of sound judicial judgment, waited until that case was decided. It took considerably

longer to decide than we had thought it would, but for reason of the appellate process, and because of the consequences of this case, I know from some experience that that procedure was a wise one to follow.

Now, the Fourth Circuit Court of Appeals divided four to three on the primary question and it is not necessary to recite the primary question. You all know what it is. I shall simply say briefly that the question there was whether a school which holds itself out generally to the public, though it is referred to as a private school, that means one with no state funds, not supported by governmental funds, whether such a school may, by choice, exclude black applicants on the basis of the fact that they are black, there being no nexus between government and the operation of the school.

The first thing that is important to understand in this cause is that the plaintiffs did not present a constitutional question. This is not an equal protection type case. This is not a constitutional question at all as presented by plaintiffs. It is the defendants who have raised the constitutional question as a defense. This case, as did the Court of Appeals' case referred to, turns upon the interpretation of the old civil rights statute regarding non-discrimination in contracts, a law passed by Congress back in the 1890s.

The United States Court of Appeals, in McCrary, held in a divided decision, that the statute did in fact apply when an applicant seeks entry into a school, even though that school has no nexus with government as far as funding, control, etc.

The Court held that it was, in fact, a contractual arrangement that was being applied for and that if a party was discriminated against because he was black, that that statute would apply and would preclude such discrimination.

A Federal Judge in Virginia by the name of Bryan originally ruled that and the ruling was upheld, was affirmed by the Court of Appeals by a four to three vote. That case is controlling here and the Court, of course, will follow it.

There is presently pending in the Fifth Circuit Court of Appeals a case which went up well after the McCrary case was lodged in the Fourth Circuit Court of Appeals. The case is not directly in point with this one but it is related and it is my professional opinion that that case will be some time in being decided. I would not be surprised at all if the Court were embanked for that determination. Having waited as we did, having understood that we were looking to the Fourth Circuit teachings and because the Fourth Circuit case is directly on point and the Fifth Circuit case is not directly on point, this Court will, in fact, make the rulings that it is making now. I would not be at all surprised if the Fifth Circuit in the related case ruled to some degree contrary to the ruling of the Fourth Circuit, but District Courts cannot anticipate that. I would not be at all surprised if the Supreme Court of the United States ruled contrary to the four to three ruling in the Fourth Circuit, however, this Court follows the law as it is written and does not have the right to anticipate rulings because, of course, it does not know what they are going to be.

Therefore, having ruled that McCrary v. Runyon is controlling in the case before this Court, the Court adopts that majority rule. That leads us then to the matter which is here for specific ruling today. That ruling is in fact a purely factual determination. It turns entirely upon fact and the ruling constitutes findings of fact.

We must be certain that we are applying the proper test as we answer the factual issue. These gentlemen have said to the Court that the factual issue really is whether or not the Brown children were excluded from attendance because of a sincerely held religious belief, meaning, I think, sincerely held by the leadership in the school, by the defendants.

Now, we must remember in that connection that we are not here considering a conscientious objector application where the Courts look to determining whether or not a particular applicant sincerely holds a religious belief, thereby causing him to be entitled to a conscientious objector status because that sincerely held religious belief is one which would exempt him from bearing arms.

We are here concerned with whether or not the leadership in the school, or the school itself, excluded the Brown children because of a generally held religious conviction, a generally held tenet of religion. In other words, we are not talking about whether one individual out there operating the school may have had some particular fundamental belief, or one person in the church had a particular fundamental religious belief, but whether there was a generally held, recognized, fundamental religious tenet of the school through its leadership.

As an example, as was discussed in the Wisconsin v. Yoder case. There they were dealing with whether or not the Amish had this generally held religious conviction that was being discussed in that case.

Now, with that brief comment, the Court accepts the issue as presented by the parties, that is, whether the Brown children were excluded because of a sincerely held religious belief, which if the Brown children had been accepted, their admission would have violated the free exercise of religion clause of the United States Constitution.

The answer to the factual issue is quite clear to this Court. It is taken from the candid and honestly stated words of Dr. Janney and of the deponents in the depositions that were presented to the Court, and from the documentary evidence in this case.

However, before I recite those facts which led the Court to the conclusion it has reached and will here announce, I want to make a couple of statements which I think are important to be made prior to the factual discussion that will follow.

The first is that the validity of what one believes cannot be questioned by the Court. Courts cannot reject religious beliefs because they consider the beliefs even to be incomprehensible, according to the language of Mr. Justice Douglas and the Supreme Court, and this is repeated throughout the cases. So, this Court is not at all, in the process of this ruling considering the validity of the belief professed, that belief having been professed as follows: That the comingling of the races is nonscriptual; that the

comingling of the races in a school would lead to intermarriage and that portions of the Old Testament and of St. Paul's letters, epistles to the churches suggest that comingling of the races is as expressed by the pastor nonscriptural.

The second thing that the Court should like to make clear is that because of the nature of this ruling, we shall not reach the issue of whether there is state interest of sufficient magnitude to override the interest of those claiming the protection of the free exercise clause of the Constitution of the United States, because the factual issue that shall be determined forecloses any consideration of that question.

Perhaps a statement by Mr. Kalapp summarizes the facts in this case. I give you this statement first because of its impact and then in the future findings of fact I shall discuss why Mr. Kalapp's statement was true and sound. In speaking of a policy against admission of blacks to the school and in answer to this question, "How was that policy adopted?" Mr. Kalapp responded, "I don't think it," that is the policy, "was adopted at a specific time as I recall it. I think it was something that evolved as a philosophy and a policy over a period of a number of meetings." Now that is a factual summary of this matter and that factual summary was made by Mr. Kalapp.

I point out here that when the Brown children received the note explaining that the school was sorry that its policy was one of non-integration, the school itself announced a policy, not a fundamental religious concept or belief.

I do not propose to be facetious in any way by making this statement, and I do recognize, this Court does recognize, that these defendants hold a sincere belief that their policy, their philosophy which evolved, was right, and that it, in fact, in their minds can be justified in the Scriptures, but a policy, a philosophy which evolves over the passage of time from 1961 until 1973 simply does not constitute that type of sincerely held religious belief, fundamental belief, which is protected by the free exercise of religion clause of the United States Constitution. I mention that I do not want to be facetious and I do not wish to be argumentative, but I do say to you that the Old Testament and the Acts of the Apostles and St. Paul's epistles have been around a long time. St. Paul lived and wrote in the first contury, by our calendar. So that it seems to me that a philosophy that evolves as social conditions change, as sincerely held as that philosophy may be, does not rise to that fundamental religious belief or practice which is protected by the free exercise of religion clause of the Constitution.

Now, not only did Mr. Kalapp quite honestly summarize the situation, but the principal of the school, on deposition, Mr. Kreft, answered the following question: "Who instructed you regarding the policy of non-integration?" His answer was, "The specifics of who instructed me? We didn't have a specific board meeting that I can recall. Basically it would be more or less the Board of Directors of the school who would direct me regarding the policy of enrollment."

Now we come to the factual matters that the Court has noted which clearly and abundantly bear out the summary that I have just given you as stated by Mr. Kalapp.

According to the testimony in this case the school was founded because those in executive capacity of the New Testament Baptist Church discussed the need for a Christian school as a fallout of the removal of the bible reading and so forth from the public schools. This discussion occurred somewhere in the early 60's because the literature says that the school was founded in 1961. It was incorporated in 1962.

Now, this Court can take and does take judicial notice that within this very district so-called school integration cases in the public schools were in progress. I know that the one in Palm Beach County was in progress because I ended up with it many years later and I am sure it was started in 1956. But this school was founded because of the need that was felt by the executive people there, and I use the term that was used in the answer, those of us in executive capacity, (I assume the gentleman was speaking of those in the church.) a need for a school as a fallout of the removal of bible reading and so forth in the public schools, not because of some fundamental religious belief about comingling of the races, and when the Articles of Incorporation were drafted and accepted, they contained an article, namely Article Three, which reads in part as follows:

> "The membership of this corporation," not referring now to students, "shall consist of any and all competent persons of good moral character who sympathize with and in good faith wish to participate in the purposes and objects herein expressed."

No reference there to any fundamental religious tenet or conviction reference comingling.

Mr. Verle S. Ackerman was associated with the school for about the first five years of its existence. He had not been associated with it for about six years immediately prior to the taking of his deposition. Mr. Ackerman was one of the first officers of the corporation. He was the secretary-treasurer. He states that he knows of no resolutions that were ever adopted by the Board alluding to the fact that no blacks would be admitted to the school. He was there for the first five years. When he was asked if up to the time he left there was any policy that had evolved concerning enrollment of black students he answered, "Not to my knowledge," and this is of considerable importance, "The issues in the first five years were not very strong issues in those days, because even in our public schools, the integration was just very token, and just beginning at that time." He said there were no directives issued prohibiting blacks from enrolling, "because it had never arisen. We never faced that," again indicating, as expressed by Mr. Kalapp, that the policy evolved as the issue arose, as the Board or leadership began to concern itself with whether or not black children might apply.

Mr. Kalapp, who was one of the incorporating officers, stated on his deposition that the policy, I underline his language, "came into being on a very gradual basis, because in the very early days of the school there was no such

conversation in regard to integration." At some point later the school, he said, "decided that a school philosophy needed to be adopted in view of the fact that it had gotten to be such a topic of conversation, . . because of all the furor in the newspapers and other news media that was being brought about by such things as busing and forced integration in schools." Hence the evolution of what he refers to as the philosophy and the policy that developed over a number of meetings.

The principal, when asked, "Is there a requirement that students have to be of the Caucasian race?" he replied, "The only way I can refer to that would be to the particular point that there was a policy generally described to me as 'we should not have integration of the races,' so I generally knew there was going to be a position of the school." He said this in connection with his coming to the school as the principal. He said that this decision was made about the time he was moving to the school and when asked if he was aware of any biblical directive which forbade the comingling of blacks and whites, his answer was as follows:

> "If I interpret the biblical directives? Say policy or written statement, I would simply refer to the ballot in the minutes. I don't know of any other dictates, so-to-speak, written. It is my duty to follow the policy."

So, the principal quite candidly, quite properly, states that he knows of a ballot and he simply follows the policy given to him. The principal did not exclude, and I realize that he was not the particular individual present that particular

day, but he did not exclude these children because of a fundamental religious tenet. He was following policy. Now we find later that Dr. Kreft does not disagree with the policy and that he, as the other people have, has a very sincere belief that the policy is correct. He said that he was not aware of what Dr. Janney based the forbidding of the comingling of blacks and whites upon. He said that basically he got his directives from Dr. Janney. If it had to do with finances he would go one place and other places for other ones, but generally from the Board and Dr. Janney, of course. He said he wasn't aware of what the forbidding of comingling of blacks and whites was based upon. His answer was, "Just by general references. Now, I don't know of a specific position, other than policy directives."

If the reason for excluding the children grows to the position of a fundamental religious practice or belief protected by the free exercise clause of the United States Constitution, it certainly is a reasonable inference that the principal would have known it and would have adhered to it for that reason. He stated that if there were any written material published by the Church that would indicate danger from interracial marriages that he would know of it and that he did not know of any such written material. He didn't know whether there was any teaching about socialization leading to interracial marriage and he said, "All I know is that this was the philosophy adopted by the Board, that the philosophy would be that it would be contrary to God's precepts and teachings to comingle the races and that the policy was not distributed through any of the literature of the school."

Now, I mention that these people, in good faith, have concluded that their philosophy can be reconciled with certain passages in the Old Testament and certain writings of St. Paul, and that statement was made after the institution of this law suit and Dr. Kreft quite candidly and honestly stated what he knew to be the position of the leadership there.

Now we come to a discussion of some of the documentary evidence in the case, but before I do that, I want to make a further finding of fact on what I have just mentioned with reference to literature about intermarriage which fits in with what I am about to say about the application for admission to the Dade Christian School.

A basic, fundamental tenet, one that, as expressed in one place in Yoder, pervades the thinking, the way of life of a certain group, certainly is one which is discussed in the school, certainly is one upon which literature is written and available in the school. It is not at all unusual for a group of persons to have fundamental religious beliefs about intermarriage. We are really not talking here directly about intermarriage, but about having such a fundamental religious belief, which it is reasonable to infer would be discussed and written about in the school of that particular religious group.

Now, Exhibit eight includes an application for admission to the Dade Christian School. The face sheet sets forth nine specifics under the heading of "We Believe." Those beliefs would appear to the Court to be the basic religious beliefs, the fundamental religious beliefs, religious tenets of the Dade Christian School. Where, in the listing of those

things which "we believe" is there a tenth fundamental religious belief that there should be no comingling of the races? If a fundamental religious tenet exists, is believed, there is no reason why it would not be among those listed. It should be a belief of which one is proud and to which one adheres.

On the portion of the application for admission to be filled out by the student, the student is asked whether or not he will agree not to dance whatsoever, whether at home or school or elsewhere, which is undoubtedly a sincerely held belief. The student is asked whether he agrees not ever to be critical and not ever to even talk about narcotics, all of which the school has every right to ask. It seems to me that if those details are discussed with an applicant and those commitments extracted from an applicant, a fundamental religious belief regarding comingling and socialization among races must be a part of the application if it were, in fact, that type of religious tenet protected by the Constitution.

On July 17, 1963, a vote was taken. This is a year or two after the school was founded, regarding whether or not the Church would integrate or remain segregated. Approximately 165 people, according to the evidence presented to the Court, voted and all voted for segregation. The Church was founded, I believe, in 1954. The Bible was studied carefully, I am sure, under Dr. Janney's leadership. I can tell that from hearing him speak. The reading and study of the Bible is of vital importance to these people, as it should be. It simply does not follow that a vote must be taken as to what is a fundamental religious tenet. It either is or it isn't a fundamental religious tenet. Would it

be necessary to take a vote, for example, on the question of "Shall we continue to have prayer in our services?" That is a fundamental religious practice and no such vote would be necessary. Not only that, but this vote was presented on a ballot which contained other questions. I cannot tell from the record what all of them were, but I know one of them had to do with whether or not a youth camp should be retained or something about the future of a youth camp. Another seemed to have to do with a method of visitation or ministry and enlarging the congregation, and included with those questions was the question, "Should we have segregation or integration?" So, you can see that as the situation developed the people at the Church were formulating a position and a policy by vote, which is a very democratic way to do it. The Court is not complaining at all about that, nor about the policy or the philosophy of the church. The Church, however, in a deposition of Mr. Kreft, the principal of the school, said this is up to every individual member of the church. These people would not be required to answer a question of their particular belief in this matter.

A generally held, fundamental religious belief is one recognized by the group as a fundamental belief. Therefore, the vote and the statement that it is up to the individual belies the proposition that the defense is such factually as to be protected by the free exercies clause of the Constitution. There is no doubt that it is a sincerely held belief and the Court recognizes the sincerity, but their belief is not such as is protected by the free exercise clause of the United States Constitution because it is a philosophy, a policy, a sincere belief arrived at subjectively.

There were a few comments on those 165 ballots in reference to question number two, which bear out the evolution of this policy as discussed by Mr. Kalapp. One of the comments, as an example, was "Segregation is the only course of action." Another, "Segregation is wise." Another, "When you integrate, I separate." And perhaps the most interesting one, "I believe that the stand for integration we have taken is a wise decision." We have taken a position. We have taken a stand. We have formulated a policy in which we believe.

The principal, in speaking of the individuality of belief that I have referred to, when asked if there were approximately four thousand people who adhered to the belief, answered, "No, I would say that. I would just say that those that have responded would have to be counted, but they would not be required to answer a question of their particular belief in this matter."

When Mr. Kalapp was asked if the concept of no socialization between the races is a major theme of his religion, he answered, "Very minor." A very minor theme. He said that it is up to the individual's interpretation of the Bible.

The principal said that if a black student were to be enrolled that that would not destroy his exercise of religion, but that it would erode his religious liberties. The principal said that it was intermarriage that his belief prohibited and to admit black students would give rise to a specific potential of interracial marriage because to admit the Brown children would set a precedent. Mr. Kalapp also said, when asked if blacks were to be enrolled

would it endanger his religious beliefs, "If it culminated in an intermarriage situation between the races."

All of these answers show that there was concern particularly about interracial marriage. One can have a fundamental religious precept about interracial marriage and teach it, but we are talking about admission of a black student to a school. The concern is, according to the depositions, that that could very well lead to intermarriage in the future, because we expect them to be young when they come here and many of them go through the twelfth grade.

I really think that the closer precept to that which would be protected by the Constitution is one which these people express with regularity, a fundamental precept against intermarriage and the concern is a social concern, a practical concern, and a sincerely held philosophy, but not one of their nine beliefs.

This suit was filed August 6, 1973. It was served on August 9, 1973. An answer was filed on August 27, 1973. Apparently the leadership had not had an opportunity to communicate to its excellent lawyer the fact that admitting blacks would violate the free exercise of their religion, because it was September 2nd, 1973 when that position was first expressed in this litigation.

The record does not tell us when Dr. Janney delivered his message which is taped and in evidence here, but it does tell us that on August 1, 1973, five days before the

suit was filed and after the application of the Brown children, the church clerk entered the following minutes of the business meeting of the church:

> "Dr. Janey explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area unless instructed otherwise by the membership."

I commend Dr. Janney for looking to the congregation. That is not the point. Dr. Janney sounds to me like a man of such sincerity in his beliefs that he would not abandon a sincerely held fundamental religious precept because the majority directed him to do otherwise. That simply, in the language of Dr. Janney, as recorded in these minutes, demonstrates policy position, philosophy, not fundamental religious beliefs.

There are three pamphlets in evidence. They are exhibits one, two and three. I don't know who introduced them, or why, but I expect that it was to show that there were in fact writings and addresses on religious matters, including the question of "Segregation or Integration, What saith the Scripture?" Exhibit One is an address by Dr. Bob Jones, Sr., in 1960, entitled "Is Segregation Scriptural?" Exhibit Two is a discussion of "Segregation or Integration, Which?", a sermon by the pastor of the Dayton Baptist Temple, Gerald O. Fleming, in Dayton, Ohio, in 1956, shortly after the first case on school integration, a 1954 case. Exhibit Three, "Segregation or Integration. What saith the Scripture?" by Peter S. Rutland, the presi-

dent of the Pensacola Bible Institute, first edition, 1962, second edition, 1969.

There is no showing in the record that these pamphlets were ever distributed to the congregation or to the leadership, but it is at least apparent to me that Dr. Janney utilized these publications in the preparation of his sermon or discussion that was delivered following the filing of the current lawsuit. I mention that simply to say that Dr. Janney apparently had them available to him, but there is no showing that there was any distribution of them to the membership.

One of the deponents said, "Well, we had some pamphlets of some kind that were available, but I never knew of any distribution of any such fundamental religious belief." Dr. Janney, himself, answered the question for the Court, in a sense, when, after the filing of the lawsuit, he stated as follows to his congregation, speaking of the lawsuit, "Our position on this matter then is that there are biblical reasons for having separate facilities," which he, and I expect most members of his congregation, accept. "There are practical reasons. It doesn't work. There are social reasons. It leads to interracial marriage and I think that intermarriage is a very bad circumstance. It is unscriptural." Dr. Janney announced the position that would be taken in the matter. They formulated a philosophy, a policy, which they feel can be supported, can be reconciled with the Scriptures, but their philosophy still remains a philosophy as distinguished from that type of fundamental religious belief which is protected by the free exercise clause.

Just as a further fact, going to the evolution of this policy and philosophy, Dr. Janney, in his address given after the lawsuit was filed, referred to his participation in the activities of a youth camp. I don't know whether it was the church's youth camp or not. In making one of the several points he made, he talked about an underprivileged camp that he was participating in in some capacity. There were about 500 blacks and three whites at the camp and he stated that was the ratio of the underprivileged in that particular area. Now apparently, at that time at least, socialization was acceptable, albeit there were three whites and five hundred blacks, the reverse ratio as would have been in attendance at the school. We recognize that the philosophy of the school is based in part upon the fact that the children would likely be in the school for twelve years together and the camp is just a temporary thing and intermarriage, through socialization, though it might occur, was not as likely to occur in a short period as over a period of comingling for twelve years.

The only reason I mention that is that this is further evidence of the clear picture that this belief is a sincere belief and philosophy, but were it a fundamental religious belief and tenet, then it was not practiced at that camp. I mention that only as bearing upon the distinction between a philosophy and a fundamental religious practice.

The Yoder case talked about the sincerity of Henry Thoreau and his activities at Walden were based upon his philosophy subjectively formed. This leadership in this school has a philosophy and a policy which it believes in, subjectively arrived at as a result of the subjective evaluations of the social scene and political scene, but the ad-

mittance of these children would not endanger the free exercise of religion. As stated by one of the persons, it is a very minor consideration.

Therefore, all of the evidence in this case dictates the opinion and the ruling that the defense, based on the free exercise of religion clause, cannot be upheld because the position taken, which has evolved, does not rise to one of the fundamental religious tenets of the school or the church.

Dr. Janney closed his remarks with an observation that he believed that twenty years from now the school would be in the same position that it is now with reference to this question, and I don't doubt that he is right because this point of law has a long way to go to be ultimately decided in the Supreme Court of the United States and the decision is one that we cannot anticipate. This Court has followed the law and is absolutely satisfied from this record that its factual determination is correct.

DONE and ORDERED at Miami, Southern District of Florida, the 28th day of May, 1975.

/s/ Joe Eaton
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

FINAL JUDGMENT AND INJUNCTION

THIS CAUSE came on for trial before the Court without a jury on the issue of damages, liability having heretofore been determined by the Court. The issues in this cause having been duly heard and a decision having been duly rendered, it is

ORDERED and ADJUDGED that:

1. Plaintiff, Marice Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $2,000.00 with lawful interest of 6% beginning the date of this judgment.

2. Plaintiff, Johnny Brown, Jr., shall recover from

Defendant, Dade Christian Schools, Inc., the sum of $1,500.00 with lawful interest of 6% beginning the date of this judgment.

3. Plaintiff, Valerie Michelle Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

4. Plaintiff, Jacqueline Marie Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

5. Plaintiffs shall recover from Defendant, Dade Christian Schools, Inc., reasonable costs of this action.

It is further

ORDERED and ADJUDGED that Plaintiffs take nothing from the individually named defendants, and the Plaintiffs claim for damages is dismissed as to the individually named defendants.

It is further

ORDERED and ADJUDGED that Defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janey, their agents, servants, employees and all persons acting in privity with them are permanently enjoined and restrained from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrolling in the Dade Christian Schools, Inc.,

because of their race. Plaintiffs' prayer for injunctive relief is dismissed as to Defendants John M. Kalapp and V. S. Ackerman.

DONE and ORDERED at Miami, Southern District of Florida this 27 day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

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Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

On May 28th, 1975, this Court orally announced findings of fact and conclusions of law on the liability phase of this case. Thereafter a conference was held prior to consideration of the damages issue. Counsel for the plaintiffs announced at the conference that Plaintiffs' prayer for punitive damages and for an award of attorneys fees were withdrawn. The parties agreed to submit written memoranda on the issue of compensatory damages and to await the Court's judgmen: on that issue.

Upon consideration of the record and the memoranda filed, the Court enters the following findings of fact and conclusions of law.

1. The refusal of the Defendant, Dade Christian Schools, Inc., a Florida non-profit corporation, to accept the minor plaintiffs as students solely because the minor plaintiffs are black, proximately caused each of the named plaintiffs to be damaged.

2. Each of the named Plaintiffs have suffered embarrassment, humiliation and mental anguish as a proximate result of such conduct.

3. An award of compensatory damages for such embarrassment, humiliation and mental anguish is hereby made as follows:

A. In favor of Marice Brown, and against Dade Christian Schools, Inc.,[1] the sum of $2,000.00.

B. In favor of Johnny Brown, Jr., and against Dade Christian Schools, Inc.,[1] the sum of $1,500.00.

C. In favor of Valerie Michelle Brown and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

D. In favor of Jacqueline Marie Brown, and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

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[1]In the pretrial stipulation filed February 19, 1974, the parties agreed in paragraph IX, page 6, that the issue of law to be determined in the cause was "Are Plaintiffs entitled to relief . . . by reason of the refusal of defendant Dade Christian Schools, Inc., to accept the minor plaintiffs as students solely because of their membership in the black race?"

4. There is no basis in the record for finding the individually named defendants liable for the payment of compensatory damages to plaintiffs.

5. Plaintiffs are entitled to a permanent injunction restraining the defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janey, their agents, servants, employees and all persons acting in privity with them from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrollment in the Dade Christian Schools, Inc., because they are black.

DONE and ORDERED at Miami, Southern District of Florida, this 27th day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen